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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS EXZAVAR AUSTIN,

Defendant and Appellant.

C084624

(Super. Ct. No. CR20139308)

OPINION ON TRANSFER

In August of 2018, this court affirmed the conviction of defendant Dennis Exzaver Austin, holding the trial court did not abuse its discretion in declining to strike any of defendant's prior strikes.

Two months later, our Supreme Court granted defendant's petition for review and directed this court to vacate our decision and reconsider the cause in light of the newly enacted Senate Bill No. 1393 (2017-2017 Reg. Sess.; Stats. 2018, ch. 1013 (Senate Bill 1393)). Senate Bill 1393 affords trial courts discretion to dismiss or strike prior serious

felony enhancements. We will remand to allow the trial court to consider exercising this newly afforded discretion.

BACKGROUND

Defendant was charged with multiple counts arising from two burglaries and one attempted burglary — each occurring on different days. A jury found him guilty of two counts of first degree burglary (Pen. Code, § 459),¹ misdemeanor battery (§ 242), attempted destruction of evidence (§ 664/135), misdemeanor vandalism (§ 594, subd. (a)), and attempted first degree burglary (§ 664/459). The trial court also found numerous enhancements true based on defendant's prior prison terms and convictions — including two prior strikes for a 2010 first degree burglary conviction and a 2008 criminal threats conviction.

At sentencing, defendant moved unsuccessfully to strike his prior strikes. The trial court thereafter imposed an aggregate indeterminate term of 75 years to life along with a 10-year determinate term. It consisted of three consecutive 25-year-to-life terms for the two burglary counts and the attempted first degree burglary count, along with two five-year enhancements for defendant's prior serious felony convictions. (§ 667, subd. (a).)

DISCUSSION

On remand, defendant contends remand is required to allow the trial court to consider exercising its discretion under Senate Bill 1393 to strike the prior serious felony enhancements. We agree.

On September 30, 2018, the Governor signed Senate Bill 1393, which effectively removes a restriction on a trial court's ability to strike section 667, subdivision (a) prior serious felony enhancements. (Stats. 2018, ch. 1013, §§ 1-2.) Starting January 1, 2019,

¹ Undesignated statutory references are to the Penal Code.

trial courts have discretion to strike those enhancements. In defendant's case, two such enhancements were imposed.

The People agree that, as to defendant, Senate Bill 1393 applies retroactively. But the People maintain remand is unwarranted because the trial court clearly indicated it would not have dismissed defendant's serious felony enhancements had it discretion to do so. In support, the People note that at sentencing, after declining to strike defendant's prior strikes, the court sentenced him to an 85-year-to-life term, which included an exercise of discretion to consecutively sentence defendant for each of his indeterminate terms.

Defendant, however, maintains the record does not clearly indicate the trial court would not exercise discretion afforded by Senate Bill 1393. Defendant is correct.

We agree with the parties that Senate Bill 1393 applies retroactively. If an amended statute "lessening punishment becomes effective prior to the date the judgment of conviction becomes final then . . . it, and not the old statute in effect when the prohibited act was committed, applies." (*In re Estrada* (1965) 63 Cal.2d 740, 744.) Here, Senate Bill 1393 took effect before defendant's judgment of conviction will become final, and therefore it applies retroactively. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306.)

Further, the record does not clearly indicate the trial court would decline to exercise its newly afforded discretion. (Cf. *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 ["Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so"].) While defendant received a lengthy sentence — largely due to his strikes — that does not foreclose the possibility of the trial court exercising discretion on other sentencing matters. Indeed, the fact defendant received consecutive life terms is not indicative of how the trial court would exercise discretion in other sentencing matters. (See § 667, subd. (c)(6) ["If there is a current conviction for more than one felony count

not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e)”.)

In sum, because the record does not clearly indicate how the trial court would exercise its discretion under Senate Bill 1393, we will remand to allow it an opportunity to do so.

DISPOSITION

We remand to allow the trial court to consider exercising its discretion under Senate Bill 1393. In all other respects, the judgment is affirmed.

/s/
Blease, Acting P. J.

We concur:

/s/
Hull, J.

/s/
Murray, J.